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# Procuring 'Justice'?: Citizens United, Caperton, and Partisan Judicial Elections

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# Procuring “Justice”?: *Citizens United*, *Caperton*, and Partisan Judicial Elections

*andré douglas pond cummings\**

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## I. INTRODUCTION

In recent years, two inextricably connected issues have received a great deal of attention in both U.S. political discourse and in the legal academic literature. One issue of intense legal debate and frustration has been that of judicial recusal, including an examination of the appropriate standards that should necessarily apply to judges that seem *conflicted* or *biased* in their role as neutral arbiter.<sup>1</sup> A second issue that has spawned heated commentary and

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1. See *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913 (2004) (Scalia, J., mem.) (deciding Justice Scalia’s relationship with Vice President Cheney did not require his recusal);

great dispute over the past decade is that of campaign-finance law, including examination of the role that powerful and wealthy benefactors play in American electioneering.<sup>2</sup> Both issues came to a head in the past year as the U.S. Supreme Court decided two landmark cases that will have far-reaching implications and consequences, *Caperton v. A.T. Massey Coal*<sup>3</sup> and *Citizens United v. Federal Election Commission*.<sup>4</sup> The moment that these decisions were announced, their connection undoubtedly crystallized for many observers. As *Caperton* and *Citizens United* shed new light on judicial recusal and campaign finance in an interconnected manner, Professor Michael LeRoy delivers an important empirical study, *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*,<sup>5</sup> that provides evidence that we as a nation have reason to fear this potentially pernicious interconnectedness.<sup>6</sup>

In a confluence of circumstance, what has been historically controversial now puts in present peril the concept of “justice” and whether it can be “equal” in U.S. courts. *Citizens United*, *Caperton* and *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?* together pose a troubling question: will judges who are elected

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see also Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 137–52 (2004) (discussing the Supreme Court’s recusal standards); Maureen Dowd, *Quid Pro Quack*, N.Y. TIMES, Mar. 21, 2004, § 4, available at 2004 WLNR 5404331 (“In an admirable spirit of uncommon objectivity, in the pursuit of truth, justice and the American way, Associate Justice Scalia made time to poke around in the marshes of Louisiana with the equally scrupulous Dick Cheney, and then, refreshed by a well-deserved plane trip at our expense, he continued to transmit his enlightenment to a grateful nation.”).

2. See Robert Barnes, *Ruth Bader Ginsburg Says She Would Forbid State Judicial Elections*, WASH. POST, Mar. 12, 2010, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031105136.html>; Nina Totenberg, *Justice O’Connor Criticizes Campaign Finance Ruling*, NAT’L PUB. RADIO (Jan. 26, 2010), <http://www.npr.org/templates/story/story.php?storyId=122993740&ft=1&f=1003>. See generally Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 973 (2001) (examining the “benefits and drawbacks of popular elections of state court judges”); Lawrence M. Friedman, *Benchmarks: Judges on Trial, Judicial Selection and Election*, 58 DEPAUL L. REV. 451 (2009) (discussing the unique U.S. system for judicial elections); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997) (advocating the elimination of campaign contribution limits). The term “electioneering” describes taking active part in an election and more specifically “to work for the election of a candidate or party.” See *Electioneering*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/electioneering> (last visited Oct. 18, 2010).

3. 129 S. Ct. 2252 (2009).

4. 130 S. Ct. 876 (2010).

5. Michael H. LeRoy, *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*, 95 IOWA L. REV. 1569 (2010).

6. *Citizens United* and *Caperton* serve to actuate the inevitable concern expressed by many that campaign contributions and free speech protection issues have the potential to corrupt an elected judiciary. See generally C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998) (discussing the regulation of campaign expenditures and electoral speech).

in a partisan manner, where corporations can now more directly influence the result of judicial elections by contributing large cash electioneering outflows, manufacture outcomes that are biased toward those contributing corporations? The early returns are not good.

That is to say, contemporary empirical evidence suggests that the answer to the inquiry posed above is "yes." Apparently partisan elected judges are unable to sit neutrally when large corporate expenditure ushered them to the bench. Or stated differently, when corporations are able to manipulate the judicial election process through significant cash disbursement, a judge that is unfriendly, if not hostile, to employee rights will be the likely result.<sup>7</sup> The Supreme Court's decisions in *Citizens United* and *Caperton* stand poised to exacerbate this disheartening empirical implication.

The Supreme Court's acrimonious 5–4 decision in *Citizens United* struck down federal law that had prohibited U.S. corporations, in specific and narrow circumstances, from making direct election expenditures on behalf of politicians or judges running for public office.<sup>8</sup> In a carefully circumscribed way,<sup>9</sup> federal law before *Citizens United* had prohibited corporations from using general treasury funds to make direct electioneering appeal to voters through visual media thirty or sixty days in advance of an election.<sup>10</sup> The Supreme Court viewed this prohibition as violative of the First Amendment free speech rights of corporations and struck down the federal law as unconstitutional.<sup>11</sup> This decision, delivered by a bitterly divided Court, has generated much controversy and derision.<sup>12</sup> At bottom, many commentators believe that corporations are now free to powerfully influence, even more than they already do, the assortment of individuals that will sit in Congress, the White House, and on the judicial

7. In this Essay, I purposely confine my comments to the influence that corporate expenditure will have on American judicial elections. While I recognize that some of what I say here has similar applicability to labor unions and union electioneering influence, I focus on corporations for two primary reasons: First, labor unions simply do not possess the same ability and power to raise and control capital as corporations do. Unions are likely to be positioned by *Citizens United* in a way that muffles or drowns voice or message by dominant corporate messaging. Second, corporate ends and goals are wildly different than are the goals of unions and labor. Corporations exist solely to maximize shareholder profit while union goals are primarily to enhance the liberty rights of workers. See generally, Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (2007) (exploring the relationship between the labor market and labor unions).

8. *Citizens United*, 130 S. Ct. at 888–92.

9. *Id.* at 944 (Stevens, J., concurring in part and dissenting in part).

10. *Id.* at 888 (majority opinion).

11. *Id.* at 916–17.

12. See *supra* note 2 and accompanying text; see also William J. Rinner, Note, *Maximizing Participation Through Campaign Finance Regulation: A Cap and Trade Mechanism for Political Money*, 119 YALE L.J. 1060, 1064–81 (2010) (switching the focus regarding the value of pursuing campaign finance reform from notions of liberty and equality to citizen participation).

bench, selecting those who will warmly embrace their specific corporate interests.<sup>13</sup>

In *Caperton*, an equally rancorous Supreme Court, divided again 5–4, decided that under specific and narrow circumstances, due process requires that a judge recuse herself from cases where a financial donor is a party before the court and that donor played a significant monetary role in the judge assuming her seat on the very bench before which the case is pending.<sup>14</sup> As judicial recusal standards are notoriously loose and open to individual judicial divination,<sup>15</sup> *Caperton* attempts to place slight parameters around judges who have accepted generous financial support in gaining the judicial post by requiring recusal in situations where that generous financial benefactor appears before the court in which the individual, corporation, or Political Action Committee (“PAC”) sought to insert the judge.<sup>16</sup> The *Caperton* majority in announcing this narrow due process benchmark was very careful to state, repeatedly, that the circumstances that gave birth to this new recusal standard were “exceptional,” “extreme,” “rare,” and “extraordinary,”<sup>17</sup> signaling that the Court believes its new rule will impact only an exceedingly narrow sliver of cases and judges.<sup>18</sup>

Professor LeRoy’s empirical study, *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*, finds that judges who are elected in partisan races are significantly more likely to rule in favor of corporations and against employees when confronted with employment law disputes than are those judges who are either appointed or elected to their judicial posts in nonpartisan elections.<sup>19</sup> Through the lens of mandatory employment arbitration appeals, LeRoy’s data shows that when partisan-elected judges review arbitration decisions, employees win only 32.1% of the cases compared to arbitration appeals in front of appointed or nonpartisan elected judges where employees win 52.7% of the time.<sup>20</sup> This

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13. See Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 WM. & MARY BILL RTS. J. 533, 578–88 (2010); see also Z. Jill Barclift, *Elimination of Federal Restrictions on Corporate Spending in Politics: Corporations Can Have a Voice!*, CORP. JUST. BLOG (Mar. 23, 2010, 11:39 AM), <http://corporatejusticeblog.blogspot.com/2010/03/elimination-of-federal-restrictions-on.html> (discussing the implications of *Citizens United*); Steven A. Ramirez, *The Corporatocracy and Race and Gender: Interest Convergence Theory*, CORP. JUST. BLOG (Jan. 31, 2010, 4:32 PM), <http://corporatejusticeblog.blogspot.com/2010/01/corporatocracy-and-race-and-gender.html> [hereinafter Ramirez, *The Corporatocracy and Race and Gender*]; Steven A. Ramirez, *Welcome to the Corporatocracy . . .*, CORP. JUST. BLOG (Jan. 24, 2010, 12:11 AM), <http://corporatejusticeblog.blogspot.com/2010/01/welcome-to-corporatocracy.html> (describing *Citizens United* as a major power shift toward corporations and corporate interests and away from individuals).

14. *Caperton v. A.T. Massey Coal*, 129 S. Ct. 2252, 2265 (2009).

15. See Roberts, *supra* note 1, at 134–64.

16. *Caperton*, 129 S. Ct. at 2263–64.

17. *Id.* at 2272 (Roberts, C.J., dissenting).

18. *Id.* at 2265 (majority opinion).

19. See LeRoy, *supra* note 5, at 1602 tbl.3.

20. See *id.*

large gap in the data suggests troubling inferences for judges who are selected in partisan elections where corporations are now free, per *Citizens United*, to engage in largely unfettered free speech electioneering and where, per *Caperton*, recusal parameters are tightly constrained to very limited circumstances.

This Essay seeks to make sense of this confluence of Supreme Court decision making and recent empirical evidence. In examining this intermingling and its potential repercussions, Part II briefly considers several of Professor LeRoy’s more disquieting findings in *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*<sup>21</sup> Part III reviews the holding of the controversial *Citizens United* in light of LeRoy’s empirical report. Part IV examines the *Caperton* decision and queries whether it will have any protective effects in connection with corporate influence over the partisan judicial election process. Part V interrogates the consequences of LeRoy’s study, *Citizens United*, and *Caperton*, views each through a corporate law prism, and seeks to offer forward-looking conclusions and recommendations.

## II. DO PARTISAN ELECTIONS OF JUDGES PRODUCE UNEQUAL JUSTICE WHEN COURTS REVIEW EMPLOYMENT ARBITRATIONS?

Professor Michael LeRoy begins his empirical study with the question “Do partisan elections of judges contribute to unequal justice in court decisions?”<sup>22</sup> Though LeRoy is careful to cabin his answer and the implications of his empirical analysis,<sup>23</sup> the answer to his query appears to be most probably “yes.”<sup>24</sup> Through a pointed analysis of appealed employment dispute arbitration cases, LeRoy is able to quantify the number of appeals appearing before partisan-elected judges and track the outcomes of those arbitration appeals. Similarly, the empirical data examines those employment arbitration appeals that come before appointed judges and those elected in nonpartisan elections and tracks those results. In front of partisan-elected judges, employees are successful in the appeal outcome only 32% of the time.<sup>25</sup> Conversely, before appointed judges and nonpartisan elected judges, employees are successful in the appeal outcome 53% of the time.<sup>26</sup> This single differentiation is significant and demands further

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21. LeRoy, *supra* note 5.

22. *See id.* at 1572.

23. *See id.* at 1605, 1612–14 (“This study is more about the possibilities than the realities of corporate influence over the judicial process for reviewing arbitrator rulings.”).

24. *See id.* at 1605 (“Although this research does not prove that employers give strategically to state-court judges in order to extend their liability-avoidance strategies, it does provide preliminary and limited support for the proposition that partisan judicial elections produce unequal justice.”).

25. *See id.* at 1602 tbl.3.

26. *See id.*

examination. These results suggest that partisan-elected judges empirically favor corporate interests and disfavor employee interests at an alarming rate.

Of course, as LeRoy is swift to acknowledge, empirically examining appeal outcomes proves little aside from uncovering a startling disparity and beginning the debate by asking why such significant inequality exists between partisan-elected judges and appointed or nonpartisan elected judges in employment arbitration appeal outcomes.<sup>27</sup> Still, the data leads one to a likely conclusion that partisan-elected judges are much friendlier to corporate interests than are appointed judges. The data tends to show that partisan-elected judges are less likely to approve reasoned arbitration decisions that come down in favor of employees. The empirical analysis supports LeRoy's initial hypothesis that "judges selected in partisan elections where corporate political contributions are likely prevalent tend to decide cases in favor of corporate employers."<sup>28</sup> While limited, LeRoy's findings are potentially explosive. The station of judge in the United States is roundly considered to be one of a dispassionate, respected, unbiased, neutral, and fair arbiter of equal justice before the law.<sup>29</sup> LeRoy's findings undermine our judicial ideal.

Professor LeRoy points to two trends in his analysis that tend to support the argument that our nation's courts and judges have grown more hostile toward employees and their rights under the law. First, LeRoy carefully

27. See *id.* at 1605, 1613–14.

28. *Id.* at 1604.

29. See Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 4 (1996) ("[I]n my mind, impartiality is the very essence of judging and of being a judge. A judge does not look to his or her sex or racial, social, or religious background when deciding a case. It is exactly these factors that a judge must push to one side in order to render a fair, reasoned judgment on the meaning of law. In order to be a *judge*, a person must attempt to exorcise himself or herself of the passions, thoughts, and emotions that fill any frail human being. He must become almost pure, in the way that fire purifies metal, before he can decide a case. Otherwise, he is not a judge . . ."); Dana Bash & Emily Sherman, *Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches*, CNN.COM, Jun. 8, 2009, <http://www.cnn.com/2009/POLITICS/06/05/sotomayor.speeches/> (describing the controversy surrounding Justice Sonia Sotomayor's statement that she believes a wise Latina judge makes decisions from a more nuanced place than white male judges); *Text of John Roberts Opening Statement*, USA TODAY, Sept. 12, 2005, [http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext\\_x.htm](http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm) ("Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath."). But see andré douglas pond cummings, Grutter v. Bollinger, *Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in This Part of Town,"* 21 HARV. BLACKLETTER L.J. 1, 59 (2005) (challenging Clarence Thomas's assertion that he is a neutral, dispassionate judge); Daphne Eviatar, *Sen. Whitehouse Denounces Roberts' Umpire Theory of Judging*, THE WASH. INDEP., July 13, 2009, <http://washingtonindependent.com/50647/sen-whitehouse-denounces-roberts-umpire-theory-of-judging> (quoting Senator Sheldon Whitehouse challenging John Roberts' assertion that he is a neutral "umpire" in his judicial reasoning).

breaks down the employment arbitration process as it has evolved in the United States for the past several decades.<sup>30</sup> Second, LeRoy provides a brief description of the meteoric rise of campaign contributions, particularly those made by corporations in the context of judicial elections across those states that engage partisan judicial elections.<sup>31</sup> In reviewing both, LeRoy connects the litigation avoidance strategy employed by corporations through adopting the mandatory arbitration process and the trend toward challenging adverse decisions in the state courts, while simultaneously employing a stratagem of significantly influencing the judicial election process with large campaign contributions on behalf of those judges that embrace an employer friendly view of employment disputes.

The legal development of workplace disputes in America, under any fair observation, reveals a trending toward favoring employers and corporations and away from protecting the rights of employees.<sup>32</sup> During the past decade, corporations began carefully selecting, imposing, and manipulating the mandatory arbitration process and embracing it as a strategic tactic employed to avoid liability, courts, and costs.<sup>33</sup> By imposing mandatory arbitration upon its employees, corporations sought to bar individual employees from suing them, thus limiting litigation risks and costs and further specifying arbitral forums and arbitration-process rules.<sup>34</sup> As corporations were securing judicial approval of the mandatory arbitration process and busying themselves with writing mandatory arbitration clauses that favored their interests in every conceivable way,<sup>35</sup> something unexpected happened: employees began winning their arbitration hearings.<sup>36</sup> This untenable result from the perspective of employers forced corporations to either abandon the mandatory arbitration process, or more often, begin seeking state court review of the “final and binding” arbitration proceedings it had forced upon its employee in the first instance.<sup>37</sup> Corporations, in demanding to have it both ways, forced their employees into mandatory arbitration, but then upon discovery that the sought-after protections against employee claims were not forthcoming at the hoped-for

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30. See LeRoy, *supra* note 5, at 1576–90.

31. *Id.* at 1590–97.

32. See *id.*, at 1576–90; Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 202–04 (2010); Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers’ Rights Under the National Labor Relations Act* (May 2008), <http://ssrn.com/abstract=1133607>.

33. See LeRoy, *supra* note 5, at 1576–81.

34. See *id.* at 1581–82.

35. See *id.* (“Numerous examples show how employers strategically avoided public justice by first requiring arbitration and then requiring the use of rules that disadvantage employees. Employers required their workers to waive their right to sue and to use arbitration in place of courts.”) (footnote omitted).

36. See *id.* at 1582–83.

37. See *id.* at 1584–86.



percentages, began challenging the arbitration awards in the state courts—those very same courts that corporations had sought to avoid by forcing mandatory arbitration.<sup>38</sup> As challenging arbitration awards in courts has become commonplace, the need to have a “certain” kind of judge on the bench has become imperative to corporations and their human executives.

The rise of campaign contributions in state judicial elections is breathtaking. LeRoy reports that state judicial campaign contributions have skyrocketed in the past decade.<sup>39</sup> “Thirty-nine states hold judicial elections. Between 2000 and 2009, State Supreme Court candidates raised \$205.8 million, according to the Justice at Stake Campaign, a watchdog group that monitors money in court races. That was more than double the \$84.9 million raised the previous decade.”<sup>40</sup> Alabama Supreme Court candidates raised a combined \$13.4 million during a recent election cycle, and a sitting judge and his opponent in an Illinois state court race raised \$9.3 million between them, “an amount that exceeded expenditures that year in eighteen of thirty-four U.S. Senate campaigns.”<sup>41</sup> Spending for state supreme court seats in fourteen states increased 167% from 2000 to 2002 and increased another 163% from 2002 to 2004.<sup>42</sup> Of course, the primary concern with this skyrocketing spending on state judicial elections is the threat posed to the ideal of judicial independence.<sup>43</sup> Can a judge be truly independent when he or she has received extraordinary financial support from various interest groups and owes his or her seat on the bench to a particular benefactor or group?

Further, recent trends in judicial campaign finance indicate that out-of-state special interest groups are now taking particular issue interest in judicial candidates that meet their campaign contribution “criteria.”<sup>44</sup> Corporations and special interest groups, whose own states do not conduct partisan judicial elections, are now identifying judicial candidates that run in partisan election states and are directing their out-of-state funding toward election of particular candidates that have expressed a favored judicial

38. See *id.* at 1586 (“[E]mployers have not been shy about challenging adverse arbitration awards in court.”).

39. See *id.* at 1590–91.

40. Dorothy Samuels, Op-Ed., *Hanging a “For Sale” Sign Over the Judiciary*, N.Y. TIMES, Jan. 29, 2010, <http://www.nytimes.com/2010/01/30/opinion/30sat4.html>.

41. See LeRoy, *supra* note 5, at 1593.

42. See *id.* at 1593 (citing Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1265 (2008)).

43. See Matthew Mosk, *Citizens United v. the FEC: The Return of Corporate Influence Peddling?*, ABC NEWS, Jan. 13, 2010, <http://abcnews.go.com/Blotter/citizens-united-fec-return-corporate-influence-peddling/story?id=9545153&page=1>; Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections*, BRENNAN CENTER FOR JUSTICE (May 5, 2010), [http://www.brennancenter.org/content/resource/buying\\_justice\\_the\\_impact\\_of\\_citizens\\_united\\_on\\_judicial\\_elections/#\\_edn5](http://www.brennancenter.org/content/resource/buying_justice_the_impact_of_citizens_united_on_judicial_elections/#_edn5).

44. See LeRoy, *supra* note 5, at 1592–93.

viewpoint. Additionally, the Supreme Court has recently struck down state laws aimed at prohibiting particular political speech in judicial elections, thereby making it possible for judicial candidates running for election to make statements about abortion, rape, capital punishment, and gun control, amongst others.<sup>45</sup> This, of course, allows candidates to curry favor with special interest groups that will provide campaign contributions to that judicial candidate that best promises to support a particular issue of interest. These trends continue to exist in an environment that claims to prize judicial independence and fair and impartial arbiters. LeRoy's empirical analysis prods the thoughtful reader to consider whether judicial independence remains a possibility in the new world of *Citizens United* and current campaign funding trends.

### III. *CITIZENS UNITED*

*Citizens United* created a firestorm upon its release.<sup>46</sup> Condemned by a sitting president in a State of the Union address,<sup>47</sup> the case explicitly overruled a line of judicial precedent that effectively outlawed direct corporate electioneering under specific circumstances and declared carefully crafted campaign-finance law as enacted by Congress unconstitutional.<sup>48</sup> The holding of *Citizens United* makes permissible a corporation's direct expenditure of general treasury funds to explicitly endorse or malign a candidate for public office immediately prior to an election.<sup>49</sup> According to the Supreme Court, the free speech rights of

45. See *id.* at 1594–96.

46. See Ruth Marcus, Op-Ed., *Citizens Ruling: An Intellectually Dishonest Power Grab*, WASH. POST POSTPARTISAN BLOG (Jan. 22, 2010, 2:17 PM), [http://voices.washingtonpost.com/postpartisan/2010/01/citizens\\_ruling\\_an\\_intellectua.html](http://voices.washingtonpost.com/postpartisan/2010/01/citizens_ruling_an_intellectua.html); see also Barnes, *supra* note 2 (discussing justices' views on elected judges); Stephanie Kirchgaessner, *US Supreme Court Lifts Campaign Finance Limits*, FIN. TIMES, Jan. 21, 2010, [http://www.ft.com/cms/s/0/f17287a0-06aa-11df-b426-00144feabdc0.html?ncklick\\_check=1](http://www.ft.com/cms/s/0/f17287a0-06aa-11df-b426-00144feabdc0.html?ncklick_check=1) ("The long-awaited decision is expected to open the floodgates on corporate money in elections, reversing restrictions that have been in place since the 1940s that prohibited corporations from buying campaign ads from their own treasuries."); Samuels, *supra* note 40 (criticizing the "aggressively wrong 5-to-4 Supreme Court decision greatly escalating the power of corporate and union money in elections"); Richard L. Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE, Jan. 21, 2010, <http://www.slate.com/id/2242209/> (discussing *Citizens United* and the "activist" court); Totenberg, *supra* note 2 (discussing Justice O'Connor's criticism of state judicial elections).

47. See Press Release, President Barack Obama, Remarks by the President in State of the Union Address, (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> ("With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.").

48. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916–17 (2009).

49. *Id.* at 964 (Stevens, J., concurring in part and dissenting in part).

corporations, fictional persons under the law, simply cannot be infringed.<sup>50</sup> The implications of this holding are enormous.

Prior to *Citizens United*, corporate electioneering had to be done through a PAC, which required corporations or individuals to make specific contributions that were carefully tracked and registered with the Federal Election Commission (“FEC”).<sup>51</sup> The purpose of a PAC was to allow any corporation’s “‘stockholders and their families and its executive or administrative personnel and their families’ [to] pool their resources to finance electioneering communications.”<sup>52</sup> Corporations and unions were making extraordinary use of PACs prior to *Citizens United*, raising nearly one billion dollars in the most recent election cycle.<sup>53</sup> The “whole point of the PAC mechanism” was to initiate a separate and distinct entity from the corporation wherein corporate executives would be forbidden from funneling general treasury funds into the PAC or from forcing shareholders to support the PAC’s explicit political purpose.<sup>54</sup> The PAC allowed a corporation to engage in electioneering without holding shareholder funds hostage to the political whims or goals of corporate leadership. Congress viewed this separation as a necessary protection of both the political process and of the ability of shareholders to engage in politicking on their own terms.<sup>55</sup>

*Citizens United* turns this seemingly sensible separation upon its head. Today, corporations, through their human executives and boards of directors, may now, in a mostly unfettered manner, engage in politicking and electioneering with other people’s money.<sup>56</sup> Under the guise of free speech, general treasury funds of any corporation may now be used to campaign for or against candidates for the White House, the U.S. Senate, the U.S. House of Representatives, state governors, state legislators, state officers, and state judges.<sup>57</sup> Prior to *Citizens United*, PACs could engage in the same electioneering activity, but the critical difference now is that personal and corporate contributions to a PAC, tracked and registered, are no longer mandatory as a corporation can now spend its shareholders’ value, from its general treasury, in campaigning and electioneering.

To be sure, the prohibition against corporate-funded electioneering prior to *Citizens United* was fairly narrow. The select stream of speech

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50. *Id.* at 956.

51. *Id.* at 942–43.

52. *Id.* at 942 (quoting 2 U.S.C. § 441b(b)(4)(A)(i) (2006)).

53. *Id.*

54. *Id.* at 942 n.30.

55. *Id.* at 942–43, 945.

56. *See infra* Part V.

57. *Citizens United*, 130 S. Ct. at 907–13.

regulated by the Bipartisan Campaign Reform Act of 2002 (“BCRA”) as “especially likely to corrupt the political process”<sup>58</sup> was:

(1) broadcast, cable, or satellite communications; (2) capable of reaching at least 50,000 persons in the relevant electorate; (3) made within 30 days of a primary or 60 days of a general federal election; (4) by a labor union or a non-MCFL, nonmedia corporation; (5) paid for with general treasury funds; and (6) “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>59</sup>

The *Citizens United* majority believed this prohibition so substantially injurious to a corporation’s right to free speech that it struck down that portion of the BCRA as unconstitutional. Thus, the practical change in the law is simply that corporations can now use funds from their general treasuries to campaign through previously foreclosed media outlets, extolling explicit preferences for candidates meant to reach 50,000 persons close to an election.<sup>60</sup> While PACs were able to engage in such campaigning pre-*Citizens United*, corporations can now engage in the kind of electioneering previously forbidden. This is a subtle change of massive proportions.<sup>61</sup> *Caperton* fully displayed the potential mischief this subtle shift created.

#### IV. CAPERTON

Ironically, just months before handing down *Citizens United*, the Supreme Court decided *Caperton*, a case where political campaign contributions played a significant role in the election of a judge that would later sit in judgment over the wealthy benefactor that provided the necessary campaign contributions and PAC television advertising to see the preferred candidate seated.<sup>62</sup> In *Caperton*, Don Blankenship, president and Chief Executive Officer (“CEO”) of A.T. Massey Coal, contributed more than \$3 million to support the candidacy of Brent Benjamin for the West Virginia Supreme Court in a partisan judicial election race. A majority of the \$3 million contribution was to a PAC called “For the Sake of the Kids” which aired anti-incumbent Warren McGraw commercials on a constant loop for weeks prior to the supreme court election, asking citizens to reject “Radical”

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58. *Id.* at 945 (Stevens, J., concurring in part and dissenting in part).

59. *Id.* at 944 (citations omitted).

60. *Id.* at 907–13 (majority opinion). This practical change applies to unions as well, though the impact will be significantly different. *See supra* note 7. An analysis of these differences is beyond the scope of this Essay.

61. *See infra* Part V.

62. *Caperton v. A.T. Massey Coal*, 129 S. Ct. 2252, 2252 (2009).

McGraw as a supreme court judge.<sup>63</sup> Amazingly, during this harsh electioneering activity, Massey Coal had been hit with a \$50 million adverse jury verdict for tortiously injuring the business of a competitor, an appeal that was pending before the West Virginia Supreme Court. The judges elected in the very cycle wherein Blankenship contributed the \$3 million toward electing Benjamin would determine the fate of the sizable verdict against Massey, including whether the award would stand.<sup>64</sup> One can imagine a scenario where Blankenship weighed the costs and benefits of supporting a corporate-friendly candidate for the state supreme court and decided that \$3 million was a wise investment if it could make a \$50 million verdict disappear.

The bitterly contested partisan election, complete with vicious attack ads and charges of misrepresentation flying,<sup>65</sup> resulted in the incumbent McGraw's defeat and Benjamin's assumption of a seat on the West Virginia Supreme Court. Predictably, when *Caperton* came before that state supreme court months later, now-Justice Benjamin cast the deciding vote that reversed the jury verdict against Massey Coal and Blankenship, the company and man that were primarily responsible for ushering Benjamin onto the court.<sup>66</sup> Plaintiff Caperton moved before the appeal "to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement."<sup>67</sup> Benjamin denied this motion. Throughout the machinations of the appeal and subsequent rehearings, Caperton moved to disqualify Benjamin three times as incapable of being fair and impartial; Benjamin rejected each of those motions. Thereafter, on appeal and again on rehearing, Benjamin cast the deciding vote in favor of Massey Coal and reversed the \$50 million jury verdict on disparate grounds, albeit acknowledging that Massey had engaged in tortious business activity deserving of sanction.<sup>68</sup>

When the U.S. Supreme Court decided *Caperton*, it waded into the normally amorphous arena of judicial recusal and disqualification standards.

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63. For examples of the television advertising run against incumbent West Virginia Supreme Court Justice Warren McGraw by Don Blankenship and the PAC "For the Sake of the Kids," see *Too Radical*, YOUTUBE, <http://www.youtube.com/watch?v=A4MzgI7zHIU> (last visited Oct. 19, 2010), and *For the Sake of the Kids*, YOUTUBE, <http://www.youtube.com/watch?v=qyb8xLTJ6SM> (last visited Oct. 19, 2010), and *McGraw Too Soft on Crime*, YOUTUBE, <http://www.youtube.com/watch?v=HpVTvg56gic> (last visited Oct. 19, 2010).

64. *Caperton*, 129 S. Ct. at 2257–58.

65. See William Kistner, *Justice For Sale?*, AMERICAN RADIOWORKS, <http://americanradio.works.publicradio.org/features/judges/> (last visited Oct. 19, 2010); *supra* note 63 and accompanying text.

66. See *Caperton*, 129 S. Ct. at 2257–59 (discussing the history between Justice Benjamin, Massey Coal, and Blankenship).

67. *Id.* at 2257.

68. *Id.* at 2258.

Long left to the discretion of a challenged judge, the Supreme Court offered a new standard for those judges who owe their judicial post to generous campaign contributors. In evaluating whether a probability of bias exists to the extent that it violates a party’s due process rights to a fair trial, the Supreme Court held:

Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.<sup>69</sup>

In announcing this new standard, the Supreme Court extended its long held due process recusal standard—that the due process clause requires a judge to recuse herself when she “has ‘a direct, personal, substantial, pecuniary interest’ in a case”—to include scenarios where significant campaign contributions are bestowed upon a particular judge by interested parties before the court.<sup>70</sup> The Court opined that “[t]his rule reflects the maxim that ‘[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.’”<sup>71</sup> In analyzing the *Caperton* scenario against its new standard, the Court had little trouble finding that Benjamin should have recused himself and avoided the actual bias that informed his vote in the Massey appeal.<sup>72</sup> The *Caperton* Court found that Blankenship’s contributions “had a significant and disproportionate influence” in placing Benjamin on the case that posed the conflict.<sup>73</sup>

While the Supreme Court acted boldly in recognizing the influence of campaign contributions on the ability of elected judges to act impartially and free from bias or to refuse the “possible temptation . . . to . . . lead him not to hold the balance nice, clear and true,”<sup>74</sup> the Court was careful, almost manic, in limiting the reach of its holding to the “extreme,” “rare,” and

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69. *Id.* at 2263–64 (internal citations omitted).

70. *Id.* at 2259 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

71. *Id.* (quoting *THE FEDERALIST* NO. 10, at 59 (James Madison) (Clinton Rossiter ed., 2003)).

72. *Id.* at 2265.

73. *Id.* at 2264.

74. *Id.* at 2265 (internal quotation marks omitted).

“exceptional” facts of the *Caperton* case.<sup>75</sup> As pointed out in the biting dissent, the majority “over and over” limited its holding to the very extraordinary circumstance where a campaign contributor donates disproportionate and significant amounts of money to a judicial candidate at the same time that a case is or will be pending before the very court in which the judge seeks election.<sup>76</sup> Truly, this recusal guidance will likely have very little impact because of its excruciatingly narrow holding.

In light of the *Caperton* holding, one might logically presume that the majority author actually had a prescient sense that *Citizens United* was forthcoming and that the floodgates of corporate campaign contributions would soon be flung open.<sup>77</sup> Little comfort can be taken from *Caperton*’s conclusions in connection with LeRoy’s empirical evidence described above, where partisan-elected judges are more likely to be biased against employees and biased in favor of corporate interests, simply because mandating recusal in scenarios of manipulating corporate contributions must be “extreme” and significantly disproportionate. Corporate leaders, having clear guidance from the case, will be much too savvy to get caught up in the *Caperton* net when placing preferred judges on the nation’s courts.

## V. AN EMERGING CORPORATOCRACY

*Caperton* acknowledges the bias-inducing potential of massive campaign contributions to elected judges who are duty bound to act without bias. *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?* provides emerging empirical evidence that judges who are elected in partisan races, where campaign contributions are significant, trend strongly toward favoring employers and corporate interests while disfavoring employees. *Citizens United* strips back the protections Congress provided the American election process from unfettered corporate bankrolling and electioneering. This combination of events is potentially toxic.

Simply stated, *Caperton* reveals a reality wherein targeted judicial positions are nearly, if not fully, bought and paid for by powerful corporate interests intent on influencing judicial outcome.<sup>78</sup> Professor LeRoy’s empirical study infers that when corporate interests are successful in positioning judges as pawns, their moves are predictably and strongly in favor of those corporate interests that positioned them.<sup>79</sup> Finally, *Citizens*

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75. *Id.* at 2272.

76. *Id.*

77. Justice Anthony Kennedy authored the majority opinions of both *Caperton* and *Citizens United*. The four liberal leaning judges on *Caperton* (Stevens, Souter, Ginsburg, and Breyer) and the four conservative leaning judges on *Citizens United* (Roberts, Scalia, Thomas, and Alito) joined him.

78. *See supra* Part IV.

79. *See supra* Part II.

*United* literally invites corporate interests inside the electioneering process and enables corporations to seize an even more intimate position in U.S. elections going forward.<sup>80</sup> Some argue that this powerful new ability to control elections moves our nation from a democracy toward an emerging corporatocracy.<sup>81</sup>

While this potentially toxic prescription may sound intoxicating to some, most likely those whose interests will be furthered in this new era of corporate electioneering, others may simply agree with the *Citizens United* majority in holding that American corporations should have their ability to speak freely within the election context protected—what harm can be done? Those favoring the *Citizens United* outcome suggest that U.S. citizens should hear from all relevant voices, including corporations, and then freely choose from amongst all competing messages which ring particularly true when deciding upon whom to elect. In principle, this view is attractive and convincing. However, several doctrines of corporate law and recent trends in its practice should be examined before determining that corporations, and their newly actuated election voices, should be considered harmless.

#### A. OTHER PEOPLE’S MONEY

The most basic principle in corporate law is that corporations exist for the sole purpose of maximizing profits for its shareholders.<sup>82</sup> Limited exceptions exist that allow corporations to make meaningful but reasonable contributions to charitable organizations and public institutions for the purpose of increasing goodwill and contributing to the communities in which the corporations do business.<sup>83</sup> A corporation is viewed as a fictional person under the law and as such, has the right to sue and be sued and after *Citizens United*, has the right to exercise its free speech at all times and in all places, particularly during election cycles.<sup>84</sup> Of course, as a fictional person, the corporation cannot function without human management, so corporate law provides a management mechanism of shareholder ownership of a corporation with voting rights, an elected Board of Directors oversight regime where shareholders elect board members, and day-to-day business management by executives selected by the overseeing board. The CEO is the primary leader of the corporation and is tasked with managing the daily operations and also typically sits on the Board of Directors.

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80. See *supra* Part III.

81. See *supra* note 13.

82. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 681 (Mich. 1919).

83. *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 586 (N.J. 1953).

84. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 907–13 (2010).



Corporate law has evolved to the point where the CEO has become an almost invincible corporate character.<sup>85</sup> The model of shareholder democracy has been ameliorated to the point that the CEO and his pursuit of personal fortune is the primary driver behind most corporate positioning.<sup>86</sup> The CEO dominates American corporations to the extent that he is held to very few standards of responsibility and is able to stave off all shareholder dissent through careful calculation.<sup>87</sup> According to Professor Steven Ramirez, “CEOs of public companies have the unique privilege of picking their own nominal supervisors—the board of directors.”<sup>88</sup>

Today, the CEO in the United States has the power to appoint the board of directors that “oversees” his performance,<sup>89</sup> to maneuver board members off of the board if they challenge his decisions,<sup>90</sup> to establish his compensation through the board committee that he appoints,<sup>91</sup> to make reckless decisions that are primarily protected by the business judgment rule,<sup>92</sup> to exercise nearly unfettered power as the fiduciary duties of care and

85. See Steven A. Ramirez, *The Special Interest Race to CEO Primacy and the End of Corporate Governance Law*, 32 DEL. J. CORP. L. 345, 345 (2007) (“Corporate governance law in the United States is deeply flawed.”).

86. See Lucian A. Bebchuk, Essay, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 679–81 (2007) (examining the importance of corporate elections and having directors who are accountable to shareholders); see also Ramirez, *supra* note 85, at 353 (portraying the American public corporation as a “‘dictatorship’ of the CEO”).

87. Thomas W. Joo, *A Trip Through the Maze of “Corporate Democracy”: Shareholder Voice and Management Compensation*, 77 ST. JOHN’S L. REV. 735, 758–60 (2003).

88. Steven A. Ramirez, *American Corporate Governance and Globalization*, 18 BERKELEY LA RAZA L.J. 47, 55 (2007) [hereinafter Ramirez, *American Corporate Governance*] (describing the proxy rules that essentially allow the CEO and management to determine who leads a corporation and established significant obstacles for shareholders who wish to nominate persons for the board of directors); see Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313 (2007) [hereinafter Ramirez, *The End of Corporate Governance Law*].

89. Ramirez, *American Corporate Governance*, *supra* note 88, at 56 (“This means that the CEO may stack the board with cultural and social clones in order to maximize compensation. Shareholder democracy is a myth in the U.S., and management interests have worked to keep it a myth.” (footnote omitted)).

90. See *CNBC on Assignment: Rebellion in the Magic Kingdom* (CNBC television broadcast Jan. 24, 2005) (Maria Bartaromo reports on the famed Disney shareholder lawsuit in the Michael Ovitz executive compensation case where CEO Michael Eisner deftly maneuvered Roy Disney off of The Walt Disney Company’s board of directors when Disney began challenging Eisner’s authority).

91. See Ramirez, *The End of Corporate Governance Law*, *supra* note 88, at 333 (“[T]he CEO may stack the board with cultural and social clones in order to maximize compensation.”).

92. See Marc I. Steinberg, Commentary, *The Evisceration of the Duty of Care*, 42 SW. L.J. 919 (1988) (examining director-protection statutes); see also Steven A. Ramirez, *The Chaos of Smith*, 45 WASHBURN L.J. 343, 344 (2006) (“The paradox of *Smith* is that, while it was perceived to heighten the duty of care applicable to directors of corporations, it in fact operated to dilute the obligations of the directors.”).

loyalty have been judicially emasculated to the point of near nonexistence,<sup>93</sup> and to escape private shareholder lawsuits as class action securities fraud actions have been congressionally neutered to a near terminal state.<sup>94</sup> U.S. corporate law has empowered CEOs and corporate management to generate personal short-term profit and gain at the expense of long-term vitality and shareholder profit maximization in astounding ways.<sup>95</sup>

At base, CEOs and corporate boards are charged with overseeing the value of corporate wealth that belongs primarily to shareholders and only nominally to them as corporate leaders. Corporate executives and board members stand in a fiduciary relation to shareholders and are trusted to make sound decisions on behalf of the shareholders who have entrusted them with their wealth. Unfortunately, corporations, or more accurately, the human beings that actuate and lead a corporation, have proven repeatedly and consistently over the past several decades that they will act recklessly when spending other people's money. The financial market crisis of 2008 provides ample evidence that reckless pursuit of profit often prevails when executive leadership is taking risks with other people's money.<sup>96</sup> Further, corporate executives are often careless when deciding upon what charitable contributions to make, again, when deciding how to spend the shareholders' money. Perhaps the most egregious example of irresponsible corporate caretaking occurred in the wake of the Troubled Asset Relief Program ("TARP") bailout where funds were dispersed to major corporations to save the economy from collapse. Corporate leaders' determination of how to spend and shepherd taxpayer funds provided through the largess of the U.S. government, particularly in light of the irresponsible decision making that necessitated the TARP disbursements, highlights the recklessness and harm

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93. See Bebchuk, *supra* note 86, at 679–82 (examining the importance of corporate elections and having directors who are accountable to shareholders); see also Ramirez, *The End of Corporate Governance Law*, *supra* note 88, at 317 (advocating the displacement of courts, state legislatures, and other politicized regulatory agencies in favor of "an expert administrative agency subject to market tests and resistant to special interest influence").

94. See andré douglas pond cummings, "Ain't No Glory in Pain": *How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets*, 83 NEB. L. REV. 979, 1004–33 (2005) (describing the Private Securities Litigation Reform Act and the myriad ways that it strips shareholders of the ability to hold corporate executives accountable for fraud); see also Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055 (1999) (examining the recent congressional preemption of state-law class-action suits against publicly held companies).

95. See *supra* notes 85–94; see also Ramirez, *The End of Corporate Governance Law*, *supra* note 88, at 334 (describing how lax corporate laws allowed one company to "backdate[] options grants to enrich a dead executive").

96. See andré douglas pond cummings, *Racial Coding and the Financial Market Crisis* 9–62 (May 18, 2010) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1609816](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1609816) (describing the failures in corporate governance and by executive leadership that precipitated the financial market crisis of 2008).

that corporate decision makers can cause when dealing with other people's money.<sup>97</sup>

First, in connection with the financial market crisis of 2008, recent reports, newspaper accounts, and congressional testimony reveal that from the very top of Wall Street corporate leadership all the way down to the trenches of unregulated mortgage brokering, corporations, through their human leaders, acted with reckless disregard for the value of shareholders, the life savings of employees and investors, and the mortgage burdens of clients and average citizen homeowners.<sup>98</sup> Insatiable greed across the board caused the subprime market crisis, but the driving force behind the greed was Wall Street's ravenous appetite for subprime mortgages that could be bound into asset-backed securities, sold into collateralized debt obligations, hedged by credit default swaps, and then sold in tranches to global investors at mind bending profits.<sup>99</sup> This market was based primarily on a housing bubble that collapsed causing nearly every important U.S. investment bank and commercial bank to face certain collapse if not for the taxpayer bailout. The wild risk-taking adopted by nearly every corporate executive prior to the market collapse was breathtaking. Despite warning signs, signals, and contrary risk modeling, corporate executives intentionally ignored these signs and gambled with and lost billions of dollars of shareholder value.<sup>100</sup>

Second, famed investor Warren Buffet, in recognizing the incredible phenomenon of corporate executives spending other people's money, originated a term he called "elephant bumping." Corporate law, while holding sacrosanct its primary principle of "maximizing shareholder profits," carves out an exception allowing modest charitable contributions from corporate coffers.<sup>101</sup> Buffet describes the process of elephant bumping as one where a primary fundraiser who is seeking a generous charitable contribution from a targeted corporate executive will invite a very important celebrity or superstar executive to accompany the fundraiser to the pitch meeting. Once the fundraiser is sitting in the office of the targeted corporate executive with an elephant (very important executive or celebrity) beside him, nodding approvingly whenever the fundraiser asks for the large corporate contribution, Buffet reports that the fundraiser is successful 100%

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97. *See id.* at 15–18.

98. *See id.* at 29–60.

99. *See id.* at 44–60.

100. *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 3–13 (2010).

101. *See* A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 582 (N.J. 1953) (holding that corporations have the power to make "reasonable charitable contributions . . . even apart from express statutory provisions").

of the time in receiving the large contribution the fundraiser seeks.<sup>102</sup> Thus, elephant bumping occurs by stroking the ego of a sitting executive by bringing an elephant into the meeting causing the targeted corporate executive, careless and self-important, to view himself as important enough to host elephants and thus capable of pledging shareholder value as a contribution that affirms his importance.<sup>103</sup> Buffet muses that never has the fundraiser seen a corporate executive take out his own personal checkbook and contribute to the charity personally; rather, each and every targeted executive, feeling his own importance, commits shareholder value to the particular charity of interest.<sup>104</sup>

Finally, in considering how corporate executives spend other people's money, the TARP bailout funds were used primarily to prop up Wall Street titans at a cost to U.S. taxpayers of more than \$3 trillion dollars.<sup>105</sup> Rather than liberating (or freeing up) lending, which was a portion of the stated purpose of the infusion of TARP funds, the corporate executives hoarded the taxpayer gifted capital to improve their balance sheet performance.<sup>106</sup> With massive infusion of taxpayer capital and huge loans made available to Wall Street firms from the Federal Reserve Bank, Wall Street responded almost immediately by paying near record executive compensation bonuses for 2009 "performance." Additionally, Wall Street leadership chose to use millions of dollars of TARP funds, provided by U.S. taxpayers, to pay lobbyists to fiercely lobby against new financial services regulations Congress was considering in light of the reckless behavior of those same executives.<sup>107</sup>

Commercial and investment banks used the taxpayer bailout funds provided by the U.S. government to pay hundreds of millions of dollars in executive compensation. Wall Street firms used taxpayer bailout funds derived from government corporate welfare to pay hundreds of millions of dollars to lobbying firms employed to aggressively fight new financial sector

102. Warren E. Buffet et al., *Hostile Takeovers and Junk Bond Financing: A Panel Discussion*, in KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER 10, 14 (John C. Coffee, Jr. et al. eds., 1988).

103. See *id.* (explaining that "when they look around the room and they see all these other elephants [they assume] that they must be an elephant too, or why would they be there?").

104. See *id.* ("[N]ot one CEO has reached in his pocket and pulled out 10 bucks of his own . . .").

105. See Steven A. Ramirez, *Subprime Bailouts and the Predator State*, 35 U. DAYTON L. REV. 81, 91, 100 (2009).

106. See *id.* (describing the hoarding of capital by Wall Street firms using taxpayer bailout funds to improve balance sheets and record record profits rather than lending to a cash strapped citizenry).

107. See Aaron Luchetti & Stephen Grocer, *Wall Street on Track to Award Record Pay*, WALL ST. J., Oct. 14, 2009, <http://online.wsj.com/article/SB125547830510183749.html>; see also Elizabeth Williamson & Brody Mullins, *Firms Keep Lobbying as They Get TARP Cash*, WALL ST. J., Jan. 23, 2009, <http://online.wsj.com/article/SB123267702062508887.html>; Tim Canova, Symposium Presentation at Equality and Justice in the Obama Era, Southeast/Southwest People of Color Conference: Economic Justice (Mar. 26, 2010).

regulation. The Fed has spent more than \$3 trillion to prop up a system that has failed taxpayers without any interrogation of the system that enabled the meltdown and without any functional oversight or forced responsibility onto Wall Street elites.<sup>108</sup>

When charged with caretaking either shareholder wealth or taxpayer funds, corporate executives historically make very bizarre decisions. Whether elephant bumping is motivating corporate donations or executives are leading their companies to near bankruptcy (requiring taxpayer bailout), it is to this group of leaders, with proven reckless and negligent leadership records, that the Supreme Court through *Citizens United* confers unfettered ability to spend shareholder funds in campaigning for preferred politicians and judges. To those that tend to view this new power as harmless, a potential result of *Citizens United* is that corporations are now positioned to exercise the same irresponsible disdain for fundamental principles of risk assessment, fairness, equity, and duty in the election process that was exercised in the run-up to the global financial crisis. How this newly unfettered voice is used, and in what kind of attack ads and candidate hijacking results,<sup>109</sup> remains to be seen.

#### B. WHO LEADS?

Who is leading America's corporations? If *Citizens United* stands to transform American politicking and elections as we know them, it seems prudent to examine who leads the American corporations today that have gained this additional power. Of all Fortune 100 board of director seats, 83% are held by men, primarily white men.<sup>110</sup> Amongst the Fortune 500, only five CEOs are African-American, and only one of those is an African-American woman. Only four Latinos are CEOs of Fortune 500 companies. Just fourteen women currently lead a Fortune 500 company.<sup>111</sup> The most dominant corporate positions in the world, CEOs of Fortune 500 corporations, are overwhelmingly white male.

Of the Fortune 500 board of director seats, women hold only 15% of those seats, Latinos hold only 3% of directorships, whereas there are fewer African American directors, and the number is declining.<sup>112</sup> It is fair to say

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108. See andré douglas pond cummings, Symposium Presentation at Equality and Justice in the Obama Era, Southeast/Southwest People of Color Conference: Economic Justice (Mar. 26, 2010).

109. See *supra* note 63.

110. See Press Release, Catalyst, New Alliance for Board Diversity Report Finds Little Change in Diversity on Corporate Boards (Jan. 17, 2008), <http://www.catalyst.org/press-release/55/new-alliance-for-board-diversity-report-finds-little-change-in-diversity-on-corporate-boards>.

111. See NANCY M. CARTER, JAN COMBOPIANO & RACHIEL SOARES 2009 CATALYST CENSUS: FORTUNE 500 WOMEN BOARD DIRECTORS (2009), available at [http://www.catalyst.org/file/320/2009\\_fortune\\_500\\_census\\_women\\_board\\_directors.pdf](http://www.catalyst.org/file/320/2009_fortune_500_census_women_board_directors.pdf).

112. *Id.*

that white men continue to dominate leadership in America's corporations despite the increasing voting power and representation of minorities and women in the workplace and the nation generally. "To the extent that *Citizens United* shifts political power to corporations, fundamentally, it shifts power away from communities of color (and women) notwithstanding their increased voting power."<sup>113</sup>

Nearly every corporate leader that drove the global economy to the point of collapse, those men that led Lehman Brothers, Bear Stearns, Citigroup, Goldman Sachs, Merrill Lynch, Washington Mutual, Countrywide, and Bank of America, were a "precise" kind of corporate leader, specifically male, white, wealthy, privileged, disconnected, and possessing a voracious appetite for risky profiteering.<sup>114</sup> Despite repeated calls for Wall Street to diversify and for corporate America to adopt a leadership paradigm that embraces a different kind of worldview perspective, these calls have gone largely unheeded.

In the pre-*Citizens United* election scheme, PACs were the primary electioneering arm of a corporation. Crucially, PACs could only accept individual contributions and corporations were unable to fund PAC activity out of their general treasuries. Corporate executives were forced to bring out their own checkbooks and spend their own money, reducing their own personal wealth, when electioneering and campaigning. *Citizens United* radically changes this conceptualization. Now, corporate executives, who have proven reckless and negligent repeatedly, are now able to freely assign corporate funds and shareholder value to campaigning and electioneering. There is little evidence to suggest that these executives will be careful, thoughtful, or responsible with the new ability to spend shareholder funds at their disposal.

## VI. CONCLUSION

A five-member activist Supreme Court has delivered the future of American elections into the hands of America's corporate leadership, described above as reckless and myopic.<sup>115</sup> U.S. corporate leadership in 2010

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113. Ramirez, *The Corporatocracy and Race and Gender*, *supra* note 13.

114. See cummings, *supra* note 96; see also Felix Salmon, *Repo 105: Like Whatever*, REUTERS BLOG (Mar. 17, 2010, 10:42 AM), <http://blogs.reuters.com/felix-salmon/2010/03/17/repo-105-like-whatever/> (describing the corporate mind-set prevalent at Wall Street investment banks like Lehman Brothers (pre implosion) where a hidden \$50 million "repo" transaction is considered no big deal, just a "drop in the ocean").

115. See Hasen, *supra* note 46 ("It is time for everyone to drop all the talk about the Roberts court's 'judicial minimalism,' with Chief Justice Roberts as an 'umpire' who just calls balls and strikes. Make no mistake, this is an activist court that is well on its way to recrafting constitutional law in its image. The best example of that is [the] transformative opinion in *Citizens United v. FEC*. . . . [T]he court struck down decades-old limits on corporate and union spending in elections (including judicial elections) and opened up our political system to a money free-for-all."). See also JOHNSON & KWAK, *supra* note 100; MICHAEL LEWIS, *THE BIG SHORT*:

is simply a band of profit-driven, often careless, narrow, non-diverse group of leaders that seemingly holds a particular *laissez faire* mindset that represents only a miniscule percentage of U.S. citizens and interests. In light of this deliverance, a follow-up empirical study five or ten years from now to update campaign contribution impact on partisan-elected judges may very well find even more dismal results than what has been uncovered in 2010. Any inquiry into how electioneering funds will be spent has been signaled already through an examination of how TARP funds were exhausted. Following a highly politicized and controversial bailout, Wall Street banks and firms used the taxpayer bailout funds to shore up their balance sheets (rather than lending the funds to consumers), pay enormous 2009 bonuses claiming record profitability (rather than acknowledging the profits being gleaned on the back of Federal Reserve Bank loans and taxpayers bailout funds), and lobby intensely against new financial sector reform that would regulate away the ability of corporate executives to recklessly trade in or gamble their corporate funds to the point of bankruptcy (rather than humbly assisting the Government in conceptualizing moderate, common sense regulation that would prohibit too big to fail institutions).<sup>116</sup> Little question remains, post-*Caperton* and *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*, as to where or how corporations will spend their new *Citizens United* allowance.

Seating judges that are hostile to workers and cozy to corporate interests will surely be a byproduct of *Citizens United*. Electing legislators that are passionate *laissez faire* capitalists and antagonistic toward common sense corporate regulation will surely be a byproduct of *Citizens United*, despite a clear failure of capitalism in the recent financial market crisis.<sup>117</sup> To reverse the trend toward an emerging corporatocracy, radical corporate law reform is necessary. The first step is embracing a completely different corporate leadership paradigm. Is America ready to strip the CEO of his preeminence? Will Congress and the courts be willing to return power to the true corporation owners, the shareholders? Might Congress be willing to return private lawsuit power to shareholders that have been methodically stripped over the past two decades? Whether Wall Street and corporate America are willing to embrace diverse leadership and a genuine change in corporate culture is a question to which *Citizens United* will require an answer.

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INSIDE THE DOOMSDAY MACHINE (2010); JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY (2010); cummings, *supra* note 96.

116. See cummings, *supra* note 96; see also Ramirez, *supra* note 105 (describing the hoarding of capital by Wall Street firms using taxpayer bailout funds to improve balance sheets and record record-breaking profits rather than lending to a cash strapped citizenry).

117. See RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 260 (2009).

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